INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	4
Conclusion	7
Appendix	8

CITATIONS

Cases:

American Fruit Growers, Inc. v. *Brogdex Co.*, 283 U. S. 1 — 6
Anheuser-Busch Assn. v. *United States*, 207 U. S. 556 — 6
Biltrite Tire Co. v. *The King*, 1937 Canada Law Rep. 364 — 5
Clawson & Bals, Inc. v. *Harrison*, 108 F. (2d) 991, certiorari denied, 309 U. S. 685 — 5
Edelman & Co. v. *Harrison*, decided April 7, 1939 — 5
Federal-Mogul Corp. v. *Smith*, decided February 23, 1940 — 5
Hartranft v. *Wiegmann*, 121 U. S. 609 — 6
Helvering v. *Reynolds Co.*, 306 U. S. 110 — 7
King, The, v. *Biltrite Tire Co.*, 1937 Canada Law Rep. 1 — 5
King, The, v. *Boultbee Ltd.* (1938), 3 Dominion Law Rep. 664 — 5
Klepper v. *Carter*, 286 Fed. 370 — 7
Moore Bros., Inc. v. *United States*, decided May 14, 1940 — 5

Statute:

Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 606 — 8

Miscellaneous:

Treasury Regulations 46 (1932 Ed.):

Art. 4 — 8
Art. 41 — 9

310215—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 902

ARMATURE EXCHANGE, INC., A CORPORATION, ALSO KNOWN AS THE ARMATURE EXCHANGE, A CORPORATION, ALSO KNOWN AS THE ARMATURE EXCHANGE, INC., A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 11–25)[1] is reported in 28 F. Supp. 10. The opinion of the Circuit Court of Appeals (R. 122–129) is reported in 116 F. (2d) 969.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 17, 1941 (R. 129–130), and a

[1] References are to Volume I of the Transcript of Record unless otherwise indicated.

petition for rehearing, filed February 15, 1941, was denied February 18, 1941 (R. 130). The petition for certiorari was filed March 29, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner was a "manufacturer" or "producer" of armatures for automobiles within the meaning of Section 606 (c) of the Revenue Act of 1932, which imposes an excise tax upon automobile parts "sold by the manufacturer, producer, or importer" thereof.

STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*, pp. 8–9.

STATEMENT

Petitioner was incorporated under the laws of California (R. 28) to carry on the business of manufacturing and assembling armatures, motors and electrical equipment of any and all kinds (R. 106). During the taxable period, petitioner acquired unusable burned and worn out armatures, stripped them to the core, and by various machine and hand operations used the old core and new material to turn out "rebuilt armatures" for sale on the general market. (R. 123–124.) The details of the process are fully described in Finding of Fact VII (R. 32–38) of the trial court and in its

opinion (R. 12–17), and are graphically shown and described by pictures. (Volume II of the Transcript of Record.) Briefly, the process consisted of heating the core, cutting, chiselling and prying out the old wires, stripping the units, slotting each commutator bar, removing solder, aligning laminations, insulation of the base, winding new wires by machine and by hand, painting with solder flux, cutting and trimming wire ends, further insulation with varnish, baking in an electric oven, smoothing, polishing, knurling, testing, checking, stamping, packing and labelling. (Pictures and descriptions, Volume II, Transcript of Record.)

The armatures were sold mostly to jobbers for resale to the public. An allowance was made to the jobbers for used articles turned in. (R. 37.)

Petitioner issued a catalog (R. 60–69) and price lists ranging from $2.65 to $25. (R. 72–73.) Approximately 3,000 armatures were carried on hand in various stages of production and approximately 1,000 in complete form and ready for sale at any time. (R. 80.) The 1,000 finished products represented about 600 different types of armatures. (R. 81.) Sales transactions involved from one to as many as 40 or 50 armatures to a single jobber. (R. 81–82.) Petitioner employed some 14 or 15 men and about 80 completed armatures were turned out, checked, boxed and put on the shelves for sale daily. (R. 83.) These articles were stamped with the petitioner's trade name "Armex" (R. 60–64) and were separately boxed and labelled "Armex

Rebuilt Armature"—"A Quality Product"—"Armex Code—", and serially marked by petitioner's number (R. 77).

On July 1, 1935, a Collector of Internal Revenue informed petitioner that it was liable for the manufacturer's excise tax on its products. (R. 29.) It thereupon filed excise tax returns for the period June, 1935, to and including December, 1936, showing taxes payable of $1,052.30, which were paid. (R. 30.) On September 6, 1935, the Commissioner of Internal Revenue assessed the sum of $1,579.22 as delinquent tax and interest for the period June, 1932, to May, 1935, inclusive, upon which the petitioner paid $400. (R. 30–31.) On April 29, 1937, petitioner duly filed a claim for refund of the tax paid of $1,452.30. (R. 31.) The claim was duly rejected in full by the Commissioner on November 18, 1937. (R. 38.)

On July 15, 1938, petitioner brought suit to recover the tax paid of $1,452.30. (R. 8.) The District Court entered judgment for the petitioner in that amount. (R. 41–42.) The Circuit Court of Appeals reversed. (R. 129–130.)

ARGUMENT

Petitioner contends that it was not a "manufacturer" or "producer" of the armatures sold, but merely a repairer thereof. Certiorari is asked upon two grounds: (1) that seven different United States District Court judges have decided eight similar cases adversely to the Government, and (2)

that the decision below conflicts in principle with decisions of this and various other courts.

1. The decision below is in harmony with that of the United States Circuit Court of Appeals for the Seventh Circuit in *Clawson & Bals, Inc.* v. *Harrison,* 108 F. (2d) 991, which held that a concern engaged in the "rebabbitting" and sale of automobile connecting rods was subject to the manufacturer's sales tax here involved. This Court denied certiorari, 309 U. S. 685. While there has been some diversity of decision among the district courts, that diversity is now largely resolved by the *Clawson & Bals* decision and the decision below: five of the seven district courts referred to by petitioner are in the Seventh or Ninth Circuits.[2] There is no occasion for this Court to review the case in the absence of any conflict among Circuit Courts of Appeals.

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[2] The two remaining district courts are situated in the Eighth Circuit, and one of the cases has been appealed.

Two district courts and three Canadian courts (construing like provisions of the Canadian Revenue Act of 1927) have held in accord with the decision below. *Edelmann & Co.* v. *Harrison* (N. D. Ill.), decided April 7, 1939, not officially reported but found in 1939 Prentice-Hall, Vol. 1, Par. 5.379; *Federal-Mogul Corp.* v. *Smith* (S. D. Ind.), decided February 23, 1940, not officialy reported but found in 1940 Prentice-Hall, Vol. 4, Par. 62, 510; and *Moore Bros., Inc.* v. *United States* (N. D. Tex.), decided May 14, 1940, not officially reported but may be found in 1940 Prentice-Hall, Vol. 4, Par. 62,676; *Biltrite Tire Co.* v. *The King*, 1937 Canada Law Rep. 364; *The King* v. *Biltrite Tire Co.*, 1937 Canada Law Rep. 1; *The King* v. *Boultbee Ltd.* (1938), 3 Dominion Law Rep. 664.

2. The Supreme Court cases cited by the petitioner (Pet. 15–18) are not in point. None involved the statute upon which this controversy turns, or any related or cognate provisions in the revenue laws. *Hartranft* v. *Wiegmann*, 121 U. S. 609, involved the question of whether certain native seashells which had been cleaned with acid, ground with an emery wheel, and some of them etched with acid, were "manufactured" and therefore dutiable. This Court held them not "manufactured". *Anheuser-Busch Assn.* v. *United States*, 207 U. S. 556, arose under the Tariff Act of 1890, c. 1244, 26 Stat. 567, 617, which provided for a rebate or drawback on articles imported and thereafter exported. Corks were imported, duty paid, from Spain, and after pasteurization were used as corks for bottled beer which was exported. The Court said that the corks had not been "manufactured" in the United States and that not they but the beer was the subject of export. It therefore denied the drawback.

American Fruit Growers, Inc. v. *Brogdex Co.*, 283 U. S. 1, and certain circuit court cases relied upon by the petitioner arose under the patent laws. The *Fruit Growers* case was a suit for infringement of a patented process for preventing citrus fruit from decaying by the addition of a borax solution to the rind. This Court held that a treated orange was not a "manufactured article" and that the patent was therefore invalid. The other patent cases involved the question of what repairs a pur-

chaser of a patented article might make without infringing the patent.

None of these cases has any particular pertinence to the present issue. It should be pointed out, too, that even though some of these cases involved the meaning of the words "manufacture" or "manufactured" in other statutes, Section 606 (c), now under consideration, also uses the word "producer" which is a term of broader scope.

Furthermore, Treasury Regulations since 1920 have defined a "producer" to include a person who "produces a taxable article by combining or assembling two or more articles." Cf. *Klepper* v. *Carter,* 286 Fed. 370 (C. C. A. 9th). An administrative ruling of such long standing is entitled to considerable weight. *Helvering* v. *Reynolds Co.,* 306 U. S. 110.

CONCLUSION

Since there is no conflict among the Circuit Courts of Appeals the petition should be denied.

Respectfully submitted.

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